

Regulatory Guidance Letter 87-03

SUBJECT: Section 401 Water Quality Certification

DATE: April 14, 1987 EXPIRES: December 31, 1989

1. The purpose of this guidance is to clarify when a Section 401 water quality certification is required, when a waiver occurs, and what is required if a state changes its position on the certification.

2. Applicability:

a. Section 401(a)(1) of the Clean Water Act requires a water quality certification or waiver before any Federal permit can be issued "to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge...." The Clean Water Act further defines a "discharge" (Section 502(16)) to be a "discharge of a pollutant" (Section 502(12)).

b. **Before permit decision:** Once a Section 401 water quality certification has been issued or a waiver has occurred, the district engineer is not required to deny or condition the Corps permit should a state subsequently deny or add written conditions to the Section 401 quality certification, unless the district engineer determines there has been a sufficient change in the project such that a new application for a Section 401 water quality certification should be required. However, the district engineer will consider such denial or conditions as part of the public interest review and may deny the permit or add those conditions to a permit. On the other hand, if a state issues a 401 water quality certification, and a state or Federal court voids or sets aside that certification before the Corps issues the permit and within the statutory 1-year period from the date of application, then the Corps cannot issue the permit unless and until the 401 certification is legally revived (e.g., by an appeals court or by re-issuance or waiver of the certification by the state). Furthermore, if a state issues a certification which was previously denied, the district engineer is no longer required to deny the permit.

c. **After permit issuance:** Should a state deny or further condition a Section 401 water quality certification after a permit has been issued, the district engineer is not required to revoke or modify the permit, but may consider if modification, suspension, or revocation might be appropriate in accordance with 33 CFR 325.7. In addition, if a state or Federal court voids a 401 certification after the Corps has already issued its permit in reliance on the 401 certification, or after the passing of the statutory 1-year period, that court action does not affect the validity of the Corps permit. In such cases the district engineer may consider if modification, suspension, or revocation might be appropriate in accordance with 33 CFR 325.7.

3. Reasonable period of time:

a. **Individual Permits:** Section 401(a)(1) of the Clean Water Act provides that Section 401 water quality certification is waived if a state fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after

receipt of such request. Corps regulations at 33 CFR 325.2(b)(1)(ii) defines this period to be 60 days unless the district engineer determines a shorter or longer (not to exceed one year) period is reasonable for the state to act. The district engineer may establish such a shorter or longer period on an individual or generic basis. Furthermore, the district engineer is encouraged to establish procedures with the state so that waiver verification is presumed upon certain actions or non-actions. For example, a state may agree to a presumed waiver if they do not respond to a Corps public notice.

b. Nationwide Permits: Where a state has denied certification for a nationwide permit, 33 CFR 330.9 provides a "reasonable period of time" after an applicant seeks an individual 401 certification for his proposed activity for a waiver to occur. This "reasonable period of time" should be the same as for individual permits which is 60 days unless the district engineer establishes a shorter or longer period. See 33 CFR 330.9 and 325.2(b)(1)(ii), and paragraph 3(a) above.

4. This guidance expires 31 December 1989 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS: